In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 764

SP4 BRADISH G. MORSE, ET AL., PETITIONERS

v.

COLONEL CHARLES B. BOSWELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 11) is reported at 401 F.2d 544. The opinion of the district court (Pet. App. 11-26) is reported at 289 F. Supp. 812.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11) was entered on August 26, 1968. The petition for a writ of certiorari was filed on November 22, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the ordering of petitioners, members of the United States Army Reserve, to active duty pursuant to Section 101(e) of Public Law 89-687 violated their enlistment agreements.

2. Whether Section 101(e) of Public Law 89-687 is an unconstitutional delegation of legislative power by the Congress to the President.

3. Whether Public Law 89-687, and the Executive Order and Department of Defense Memorandum issued thereunder, authorized petitioners' activation for 24 months.

4. Whether Public Law 89-687 makes a reasonable distinction between activation of reservists as individuals and activation of reservists as members of units.

STATUTES INVOLVED

Section 101(e) of Public Law 89-687 (80 Stat. 981) provides:

> (e) Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period not to exceed twenty-four months.

10 U.S.C. 673(a) provides:

> (a) In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit,

and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve under the jurisdiction of that Secretary to active duty (other than for training) for not more than 24 consecutive months.

STATEMENT

Petitioners are 113 members of an Army reserve unit ordered to active duty on May 13, 1968, pursuant to Section 101(e) of Public Law 89-687. They brought a single action in the United States District Court for the District of Maryland, seeking to prevent the Army from assigning them overseas and to compel it to release them from active duty and return them to reserve status. Their basic contentions were that Public Law 89-687 could not constitutionally be applied to them, since the agreements under which they joined the reserve allegedly limited the period for which they could be called to active duty to 45 days; and also that Public Law 89-687 denied them equal protection and violated the doctrine of separation of powers.

The district court, treating the suit as 113 separate applications for habeas corpus, which counsel on both sides had agreed was proper (Pet. App. 12), denied relief. In a comprehensive opinion which thoroughly analyzed all the various contentions, it concluded that the calling of petitioners to active duty did not violate their enlistment agreements, but was fully consistent therewith, and that Public Law 89-687 is a constitutionally valid enactment (Pet. App. 12-26). The court of appeals affirmed *per curiam* "[f]or the reasons stated by the District Court" (Pet. App. 11). This Court denied a stay of petitioners' military orders on October

7, 1968 (Pet. App. 28), after Mr. Justice Douglas, on September 12, 1968, had granted an interim stay pending the Court's consideration of the matter (Pet. App. 27). Many of petitioners are now serving in South Vietnam (see Pet. 8).

ARGUMENT

The holding below is correct and there is no conflict of decisions in the courts of appeals. Accordingly, there is no occasion for further review.

1. The Army reserve unit to which petitioners are attached was called to active duty pursuant to Section 101(e) of Public Law 89-687, which became effective on October 15, 1966. That provision authorizes the President, "when he deems it necessary, [to] order to active duty any unit of the Ready Reserve of an armed force for a period not to exceed twenty-four months." Petitioners' principal contention is that since Public Law 89-687 was enacted after they had signed their enlistment agreements, calling them to active duty violated their rights under such agreements. This argument rests upon a misconception of the terms and nature of the agreements under which they enlisted in the reserve. Petitioners concede, as they must, that all applicable statutes in effect when they signed the enlistment agreements were incorporated therein by reference (Pet. 6; see Pet. App. 14). See, *e.g., Home Building & Loan Association* v. *Blaisdell,* 290 U.S. 398, 435. Among the statutes in effect at the time they enlisted was 10 U.S.C. 673(a), which provides that "[i]n time of national emergency declared by the President after January 1, 1953, *or when otherwise*

authorized by law," the Secretary of Defense may, "without the consent of the persons concerned, order any unit * * * in the Ready Reserve * * * to active duty * * * for not more than 24 consecutive months" (emphasis added).

Thus, in their enlistment papers petitioners agreed that they could be called to active duty for up to 24 months "when * * * authorized by law." Public Law 89-687 is a "law" within that phrase, and it was that law which authorized their call to active duty.[1] Although petitioners argue that the phrase "when * * * authorized by law" refers only to laws in existence at the time they signed their enlistment agreements and does not cover laws subsequently enacted, that contention was recently rejected in a well-reasoned opinion by District Judge Dooling in *Winters* v. *United States,* 281 F. Supp. 289 (E.D. N.Y.), affirmed *per curiam,* 390 F. 2d 879 (C.A. 2), certiorari denied, October 14, 1968, No. 263 misc., this Term. In holding that provisions in an enlistment agreement signed by a Marine Corps reservist authorizing his call to active duty when "otherwise prescribed by law" and "as the law may require" include laws enacted after

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[1] Another law which authorized petitioners' call to active duty is 10 U.S.C. 263, which provides that "[w]henever Congress determines that more units and organizations *are needed for the national security* than are in the regular components of the ground and air forces," the Army National Guard and the Air National Guard "together with units of other reserve components necessary for a balanced force, shall be ordered to active duty and retained as long as so needed" (emphasis added). Thus, in Public Law 89-687, Congress has made a determination, as contemplated by 10 U.S.C. 263, that more reserve units on active duty "are needed for the national security." See also 10 U.S.C. 262 and 10 U.S.C. 672.

he had signed the agreement, that court stated (281 F. Supp. at 295-296):

> Neither the enlistment contract nor the Statement of Understanding says in so many words that it means duty prescribed by law whether already enacted or hereafter passed, but that is the evident and necessary meaning of any language so used in such instruments. Were such instruments construed otherwise they would in effect fetter and embarrass the power of the President and the Secretary of Defense to adopt uniform and practical regulations for the administration of the armed forces and the Ready Reserve, and could indeed operate indirectly as a fetter upon the Congress itself, which would have to take action in contemplation of the existence of a large number of such agreements in force at any one time, and which it would be only appropriate, even if not necessary, that the Congress should consider in enacting new law.

This reasoning is equally applicable to the situation involved in the instant case, and compels the conclusion that the calling of petitioners to active duty pursuant to Public Law 89-687 did not violate the terms of their enlistment agreements.[2] In short, petitioners' enlist-

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[2] Although the district court did not rely on this ground, petitioners' call to active duty was in fact authorized under the express language of their enlistment agreements. Petitioners' "Enlistment Record" states, "* * * I understand that I am expected to be available for order to active duty at any time during this enlistment in event of a mobilization or emergency requiring any

ment agreements gave them no vested right to be free from future changes in the pertinent statutes.

2. Section 101(e) of Public Law 89-687 does not constitute an unconstitutional delegation of legislative power to the President. Nor does it fail to prescribe adequate standards for the exercise of the authority conferred. The authority given to the President for a limited period of time (which he in turn has delegated to the Secretary of Defense and the latter to the Secretaries of the Army, Navy and Air Force) to order reserve units to active duty "when he deems it necessary" involves the exercise of his broad power as Commander-in-Chief to determine whether the national security requires an increase in the size of the armed forces. Thus, it is questionable whether any issue involving the separation of powers doctrine is involved here at all. In any event, as noted by the district court, "Far broader delegations, without explicit standards and with even fewer implicit standards than are present in Section 101(e), have been upheld by the Supreme Court in the years which have passed since 1935" (Pet. App. 25).

3. Petitioners argue that Public Law 89-687, and the Executive Order and Department of Defense Memorandum issued thereunder,[3] did not in absolute terms authorize their call to active duty for a period of 24 months. Section 101(c) of Public Law 89-687 (Pet.

services * * *" (Pet. App. 14). The present "mobilization" is exactly what was contemplated by such a provision in their enlistment agreements. See *Goldstein* v. *Clifford*, 290 F. Supp. 275 (D.N.J.).

[3] Executive Order 11406 (Pet. App. 9) and Department of Defense Memorandum for Secretaries of the Military Departments of April 11, 1968 (Pet. App. 10).

App. 1), they maintain, requires that they be given credit for any time that certain of them, as individuals, had previously served on active duty. But Section 101(e) specifically says, "Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period of not to exceed twenty-four months." A call to active duty of a reserve unit necessarily involves a call of its individual members, and the most reasonable construction of the statute is that Congress contemplated that the unit—and the unit's individual members—could be ordered to active duty for 24 months, without regard to their previous service. In any event, this contention relates only to the length of time which petitioners will be required to serve on active duty, and not to whether their initial call to active duty was proper—the subject of petitioners' present complaint. It can presumably be raised at a later date by those particular individuals who are so affected.

4. Finally, petitioners contend that if Public Law 89-687 does authorize their call to active duty for 24 months without requiring credit for prior individual active duty service, then it is arbitrary and hence invalid as a denial of equal protection. But, as the district court pointed out, "rational differences in treatment of units and individuals are clearly not violations of [equal protection] concepts" (Pet. App. 24). Accordingly, as that court properly concluded, "Congress could sensibly decide that trained units are more valuable and more needed than individual reservists" (*ibid.*).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.[4]

Respectfully submitted.

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DECEMBER 1968.

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[4] On December 16, 1968, a petition for a writ of certiorari was denied in *McArthur* v. *Clifford*, No. 613, this Term, which presented many of the same issues raised here.

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